Evergreen Corporate Sdn Bhd v Export-Import Bank of Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(MUA)(W)-748–04 OF 2022
MOHD NAZLAN, AZHAHARI RAMLI AND WAN AHMAD FARID JJCA
23 JANUARY 2025

Banking — Banks and banking business — Facility agreement — Conditions precedent — Fulfilment of conditions precedent within stipulated period — Whether facility agreement explicitly provided that loan sum's release was dependent on borrower fulfilling all conditions precedent — Whether borrower's failure to fulfil condition precedent entitled bank to terminate without giving borrower notice or warning — Whether bank acquiesced to borrower's conduct who worked towards fulfilling outstanding conditions precedent after stipulated period — Whether bank estopped from insisting on fulfilment of conditions precedent within stipulated period — Whether bank waived requirement for borrower to satisfy outstanding condition precedent within stipulated period — Whether bank's termination of facility agreement and non-disbursement of loan to borrower valid

In 2016, in order to help fund the appellant undertaking a project awarded to it, namely, to construct and operate a thermal decomposition plant with green technology capable of recycling used tires in Simpang Pulai Perak ('the Project'), the respondent offered an Islamic financing facility of USD10,350,000 ('the facility') to the appellant. The offer was subsequently documented in an *Ijarah* facility agreement ('facility agreement'). The facility agreement contained detailed terms and conditions applicable to the grant and drawdown of the facility. In particular cl 6.2 read together with Schedule 2 to the facility agreement, the appellant was contractually obliged to fulfil all the stipulated conditions precedent within one month from the date of the facility agreement. There were 30 conditions precedent in total, consisting of 25 conditions precedent and five other additional conditions precedent that the appellant must comply with. Subsequently, the respondent issued a termination notice cancelling and terminating the facility and the facility agreement on the basis that the appellant had failed to fulfil the conditions precedent within the stipulated one-month period. The appellant then commenced the instant suit against the respondent. Primarily, the appellant sought a declaration that the termination was wrongful and prayed for specific performance of the facility agreement, as well as for damages, interests and costs. The High Court, in dismissing the appellant's claim, held that the respondent's termination of the facility agreement was valid on the ground

that: (a) at the time of the termination, and even thereafter, the appellant had not fulfilled all of the conditions precedent and the additional conditions precedent stipulated in the facility agreement to warrant the disbursement of the facility; (b) under the terms of the facility agreement, the respondent had the absolute discretion to terminate the facility at any time while there were still conditions which remained unfulfilled by the stipulated deadline; (c) there was no waiver of the requirement for the appellant to satisfy the conditions precedent which were still outstanding; and (d) the respondent was not obligated to provide notice to the appellant to fulfil the outstanding conditions precedent. Hence, the present appeal on the grounds that: (i) time was at large after the lapse of one month from the date of the facility agreement and that the respondent had acquiesced in the conduct of the appellant who was working towards fulfilling the outstanding conditions precedent after the one month period; (ii) the respondent had only issued the termination notice more than one year after the expiry of the one month period; (iii) the respondent was estopped from relying on cl 6 and Schedule 2 to the facility agreement to insist on the fulfilment of all of the conditions precedent within the stipulated period of one month; and (iv) the respondent ought to have, after the lapse, given notice to the appellant and fixed a fresh date for full compliance of all conditions precedent.

Held, dismissing the appeal:

(1) Clause 6.2 made it clear beyond peradventure that the respondent's obligation to make the facility available within the availability period, as defined under cl 1.1, to the appellant borrower was subject to the latter having first fulfilled, among others, all conditions precedent stipulated in Schedule 2 to the facility agreement. Critically, Schedule 2 stipulated that all conditions precedent (all of conditions precedent and additional conditions precedent) must be fulfilled within one month from the date of the execution of the facility agreement. This non-compliance, pure and simple, by the appellant with the provisions of cl 6 and Schedule 2 entitled the respondent to invoke its right to terminate the facility. At the same time, as a corollary, given that a number of conditions precedent remained outstanding, the respondent's obligation to make available or drawdown on the facility under the facility agreement to the appellant was never triggered (see paras 23 & 27).

(2) There were effectively two time periods governing the contractual right of the respondent to terminate the facility vis a vis the issue of the appellant's fulfilment of the conditions precedent. The first was that the respondent could terminate if all the conditions precedent were not met within one month from the date of the facility agreement. This, the appellant failed to meet fully, which led to the respondent exercising its right to cancel and terminate the facility. The second was that the respondent was also entitled to terminate the facility if there was no

disbursement or utilisation of the facility within the availability period, which was 12 months from the date of the facility agreement. Again, since the appellant did not utilise the facility within that period due to its failure to fulfil all of the conditions precedent, this also, separately, in pursuance of cl 6.2, entitled the respondent to cancel the facility at any time after the availability period ended, which the respondent lawfully did (see paras 32–33).

(3) Pursuant to the terms of the facility agreement, the appellant had proceeded to take steps and expended funds towards ensuring the fulfilment of the conditions precedent, which were its pre-disbursement obligations. Apart from such compliance with some of the conditions precedent, a number of the conditions precedent was in fact satisfied well after the expiry of the one month period following the execution of the facility agreement. Although the court appreciated the contention of the appellant that by the respondent's conduct of accepting partial or late compliance with conditions precedent, the respondent should be estopped from insisting on enforcing its rights as it had arguably waived the original one month timeframe such that time was no longer of the essence of the contract, this contention was not convincing and it was misconceived in light of the terms of the facility agreement (see paras 41 & 43–45).

(4) The language of cl 6.4 plainly stated that the respondent 'may at its absolute discretion terminate the facility' as long as the conditions precedent were left unfulfilled. Therefore, provided there were conditions precedent still unfulfilled within the one-month period, the respondent had the absolute discretion to terminate the facility, as it had done so. Crucially too, the clause did not state that the termination right must be exercised immediately on expiry of the one-month period, or that it ought to be invoked during any particular timeline after the expiry of that one-month period. Clause 6.4 was therefore independent of any time period. Governed by such clear and specific terms of the facility agreement, the respondent's conduct of accepting any partial or late compliance of conditions precedent could not therefore, be taken to have somehow constituted a waiver from the necessity for the appellant to adhere to the one-month timeframe. The respondent did not acquiesce or waive the requirement for the fulfilment of all the conditions precedent. The respondent was therefore, acting lawfully in accordance with the terms of the facility agreement when it decided to terminate the facility (see paras 48–49 & 53–54).

(5) The appellant had not been able to substantiate its allegation of any such conduct of assurance and representations made by the respondent. There nothing in writing that could adequately support the appellant's claim of

A the application of estoppel against respondent. In the circumstances, the estoppel argument could not defeat the operation of the non-waiver clause (see paras 60 & 63).

(6) Time was not at large after the lapse of the one-month period because the B respondent had the contractual right to terminate to be exercised at its absolute discretion, which need not be exercised immediately, and did not acquiesce in the conduct of the appellant who tried to fulfil all the conditions precedent after the stipulated one-month period under Schedule 2 to and cl 6.2 of the facility agreement. It accordingly followed C that there was no necessity for the respondent to have either issued any notice to fix a new timeline or reminded and followed up with the appellant on ensuring compliance with the conditions precedents still unfulfilled, post the one-month period. In the circumstances, the appellant had failed to establish its claim against the respondent on a D balance of probabilities and the High Court was not wrong in its findings (see paras 70, 74 & 80).

[Bahasa Malaysia summary

Pada tahun 2016, bagi tujuan membantu pembiayaan pihak perayu dalam E melaksanakan suatu projek yang telah diawadkan kepadanya, iaitu untuk membina dan mengendalikan sebuah loji penguraian terma dengan teknologi hijau yang berupaya mengitar semula tayar terpakai di Simpang Pulai, Perak ('projek tersebut'), pihak responden telah menawarkan suatu kemudahan pembiayaan Islam berjumlah USD10,350,000 ('kemudahan tersebut') kepada F pihak perayu. Tawaran itu kemudiannya didokumenkan dalam Perjanjian Kemudahan Ijarah ('perjanjian kemudahan'). Perjanjian kemudahan mengandungi terma dan syarat terperinci yang terpakai untuk pemberian dan pengeluaran kemudahan. Khususnya klausa 6.2 yang dibaca bersama Jadual 2 kepada perjanjian kemudahan, perayu diwajibkan secara kontrak untuk G memenuhi semua syarat terdahulu yang ditetapkan dalam tempoh satu bulan dari tarikh perjanjian kemudahan. Terdapat 30 syarat duluan secara keseluruhannya, terdiri daripada 25 syarat duluan dan lima syarat duluan tambahan lain yang perlu dipatuhi oleh perayu. Selepas itu, responden mengeluarkan notis penamatan membatalkan dan menamatkan kemudahan H dan perjanjian kemudahan atas dasar perayu gagal memenuhi syarat duluan dalam tempoh sebulan yang ditetapkan. Perayu kemudiannya memulakan saman semasa terhadap responden. Pada dasarnya, perayu memohon pengisytiharan bahawa penamatan itu adalah salah dan memohon untuk pelaksanaan khusus perjanjian kemudahan, serta untuk ganti rugi, faedah dan I kos. Mahkamah Tinggi, dalam menolak tuntutan perayu, memutuskan bahawa penamatan perjanjian kemudahan oleh responden adalah sah atas alasan bahawa: (a) pada masa penamatan, dan walaupun selepas itu, perayu tidak memenuhi semua syarat dahulu dan syarat tambahan yang ditetapkan dalam perjanjian kemudahan untuk menjamin pembayaran; (b) di bawah

terma perjanjian kemudahan, responden mempunyai budi bicara mutlak untuk menamatkan kemudahan pada bila-bila masa sementara masih terdapat syarat-syarat yang tidak dipenuhi pada tarikh akhir yang ditetapkan; (c) tiada penepian keperluan bagi perayu untuk memenuhi syarat-syarat duluan yang masih tidak dipenuhi; dan (d) responden tidak bertanggungjawab untuk memberikan notis kepada perayu untuk memenuhi syarat duluan yang tidak dipenuhi. Oleh itu, rayuan semasa atas alasan bahawa: (i) masa tidak lagi terikat selepas tempoh satu bulan daripada tarikh perjanjian kemudahan dan responden telah berdiam diri terhadap tindakan perayu yang sedang berusaha untuk memenuhi syarat-syarat duluan yang masih belum dipenuhi selepas tempoh satu bulan tersebut; (ii) responden hanya mengeluarkan notis penamatan lebih daripada satu tahun selepas tamat tempoh satu bulan; (iii) responden telah dihalang daripada bergantung pada klausa 6 dan Jadual 2 kepada perjanjian kemudahan untuk mendesak pemenuhan semua syarat duluan dalam tempoh satu bulan yang ditetapkan; dan (iv) responden sepatutnya, selepas luput, memberi notis kepada perayu dan menetapkan tarikh baharu untuk pematuhan penuh semua syarat duluan.

Diputuskan, menolak rayuan:

(1) Klausa 6.2 menjelaskan dengan jelas di luar kemungkinan bahawa kewajipan responden untuk menyediakan kemudahan dalam tempoh ketersediaan, seperti yang ditakrifkan di bawah klausa 1.1, kepada peminjam perayu adalah tertakluk kepada ianya telah memenuhi, antara lain, semua syarat duluan yang ditetapkan dalam Jadual 2 kepada perjanjian kemudahan. Secara kritikal, Jadual 2 menetapkan bahawa semua syarat duluan (semua syarat duluan dan syarat tambahan duluan) mesti dipenuhi dalam tempoh satu bulan dari tarikh pelaksanaan perjanjian kemudahan. Ketidakpatuhan ini, jelas dan mudah, oleh perayu dengan peruntukan klausa 6 dan Jadual 2 memberi hak kepada responden untuk memohon haknya untuk menamatkan kemudahan. Pada masa yang sama, sebagai akibat, memandangkan beberapa syarat duluan masih belum dipenuhi, kewajipan responden untuk menyediakan atau mengeluarkan kemudahan di bawah perjanjian kemudahan kepada perayu tidak pernah dilaksanakan (lihat perenggan 23 & 27).

(2) Terdapat dua tempoh masa yang berkesan mengawal hak berkontrak responden untuk menamatkan kemudahan berkenaan dengan isu pemenuhan syarat-syarat duluan oleh perayu. Yang pertama adalah responden boleh menamatkan perkhidmatan sekiranya semua syarat duluan tidak dipenuhi dalam tempoh satu bulan dari tarikh perjanjian kemudahan. Ini, perayu gagal memenuhi sepenuhnya, yang menyebabkan responden menggunakan haknya untuk membatalkan dan menamatkan kemudahan. Kedua adalah responden juga berhak untuk menamatkan kemudahan sekiranya tiada pengeluaran atau

penggunaan kemudahan dalam tempoh ketersediaan, iaitu 12 bulan dari tarikh perjanjian kemudahan. Sekali lagi, oleh kerana perayu tidak menggunakan kemudahan dalam tempoh itu kerana kegagalannya untuk memenuhi semua syarat duluan, ini juga, secara berasingan, menurut klausa 6.2, melayakkan responden untuk membatalkan kemudahan pada bila-bila masa selepas tempoh ketersediaan berakhir, yang responden lakukan secara sah (lihat perenggan 32–33).

(3) Menurut terma perjanjian kemudahan, perayu telah mengambil langkah-langkah dan membelanjakan dana ke arah memastikan pemenuhan syarat-syarat duluan, yang merupakan obligasi pra-pengeluarannya. Selain daripada pematuhan kepada beberapa syarat duluan, beberapa syarat duluan sebenarnya telah dipenuhi dengan baik selepas tamat tempoh sebulan berikutan pelaksanaan perjanjian kemudahan. Walaupun mahkamah menghargai pertikaian perayu bahawa dengan kelakuan responden menerima sebahagian atau lewat pematuhan syarat duluan, responden harus dihalang daripada mendesak untuk menguatkuasakan haknya kerana ia boleh dikatakan mengetepikan tempoh masa sebulan yang asal sehingga masa tidak lagi menjadi intipati kontrak, penghujahan ini tidak meyakinkan dan ia adalah salah faham berdasarkan terma perjanjian kemudahan (lihat perenggan 41 & 43–45).

(4) Bahasa klausa 6.4 dengan jelas menyatakan bahawa responden 'boleh mengikut budi bicara mutlaknya menamatkan kemudahan' selagi syarat-syarat duluan dibiarkan tidak dipenuhi. Oleh itu, dengan syarat terdapat syarat duluan yang masih belum dipenuhi dalam tempoh satu bulan, responden mempunyai budi bicara mutlak untuk menamatkan kemudahan, kerana ia telah berbuat demikian. Yang penting juga, klausa itu tidak menyatakan bahawa hak penamatan mesti dilaksanakan serta-merta apabila tamat tempoh satu bulan, atau bahawa ia sepatutnya digunakan dalam mana-mana garis masa tertentu selepas tamat tempoh satu bulan itu. Oleh itu, klausa 6.4 adalah bebas daripada sebarang tempoh masa. Ditadbir oleh syarat-syarat perjanjian kemudahan yang jelas dan khusus, kelakuan responden untuk menerima mana-mana pematuhan separa atau lewat syarat-syarat duluan tidak boleh dianggap sebagai penepian daripada keperluan untuk perayu mematuhi jangka masa satu bulan. Responden tidak akur atau mengetepikan keperluan untuk memenuhi semua syarat terdahulu. Oleh itu, responden bertindak secara sah mengikut terma perjanjian kemudahan apabila memutuskan untuk menamatkan kemudahan (lihat perenggan 48–49 & 53–54).

(5) Perayu tidak dapat membuktikan dakwaannya tentang apa-apa kelakuan jaminan dan representasi yang dibuat oleh responden. Tiada apa-apa jua secara bertulis yang boleh menyokong secukupnya tuntutan perayu terhadap permohonan estopel terhadap responden. Dalam keadaan

tersebut, hujah estopel tidak dapat mengalahkan operasi klausa bukan penepian (lihat perenggan 60 & 63).

(6) Masa tidak dianggap luas selepas tempoh satu bulan berlalu kerana pihak responden mempunyai hak kontrak untuk menamatkan perjanjian mengikut budi bicaranya sendiri, yang tidak perlu dilaksanakan serta-merta, dan tidak menunjukkan sebarang persetujuan terhadap tindakan pihak perayu yang cuba memenuhi semua syarat duluan selepas tamat tempoh satu bulan yang ditetapkan di bawah Jadual 2 dan klausa 6.2 perjanjian kemudahan. Oleh itu, tidak timbul keperluan bagi pihak responden untuk mengeluarkan apa-apa notis bagi menetapkan garis masa baharu atau memberi peringatan serta membuat susulan terhadap pihak perayu berkenaan pematuhan syarat-syarat duluan yang masih belum dipenuhi selepas tamat tempoh satu bulan tersebut. Dalam keadaan sedemikian, pihak perayu telah gagal membuktikan tuntutannya terhadap pihak responden berdasarkan imbangan kebarangkalian dan Mahkamah Tinggi tidak tersilap dalam dapatannya (lihat perenggan 70, 74 & 80).]

Cases referred to

Bank Islam Malaysia Bhd v Aquasix Corp Sdn Bhd & Ors [2014] 3 MLJ 812, CA (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor [2015] 6 MLJ 449; [2015] 9 CLJ 537, FC (refd)

Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65, CA (refd)

Interstate M&E Sdn Bhd & Ors v Fore-Sight Trading Sdn Bhd & Ors [2007] 6 MLJ 677, HC (refd)

James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] AC 583, HL (refd)

Lam Kee Ying Sdn Bhd v Lam Shes Tong & Anor [1974] 2 MLJ 83, PC (refd)

Lokumal (K) & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The August Leonhardt [1985] 2 Lloyd's Rep 28, CA (refd)

Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)

Norwegian American Cruises A/S (formerly Norwegian American Lines A/S) v Paul Mundy Ltd, The Vistafjord [1988] 2 Lloyd's Rep 343, CA (refd)

NVJ Menon v The Great Eastern Life Assurance Co Ltd [2004] 3 MLJ 38; [2004] 3 CLJ 96, CA (refd)

Perbadanan Kemajuan Negeri Selangor v Selangor Country Club Sdn Bhd [2017] 2 MLJ 819, CA (refd)
RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188; [2010] 1 CLJ 665, FC (refd)
Rock Advertising Limited v MWB Business Exchanges Centres Limited [2018] UKSC 24, SC (refd)
Semenda Sdn Bhd & Anor v CD Anugerah Sdn Bhd & Anor [2010] 4 MLJ 157, CA (refd)
Serangoon Garden Estate Ltd v Marian Chye [1959] 1 MLJ 113 (refd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464, FC (refd)
Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd [2009] 2 MLJ 546; [2009] 2 AMR 50, CA (refd)

Legislation referred to

Contracts Act 1950 s 47

Appeal from: *Evergreen Corp Sdn Bhd v Export-Import Bank of Malaysia Bhd* [2024] 8 MLJ 1 (High Court, Kuala Lumpur)

T Gunaseelan (with Keshvinjeet Singh and Kumaradevan Rajadevan) (Gunaseelan & Assoc) for the appellant.
Karlos Israphil Bendlin (Amin Karlos) for the respondent.

Mohd Nazlan JCA (delivering judgment of the court):

INTRODUCTION

[1] The respondent bank had agreed to grant financing facility to the appellant company. The appellant later commenced a writ action against the respondent for the termination of the facility prior to any drawdown. This appeal before us was against the dismissal of the action by the High Court.

[2] Having examined the appeal record and considered the submissions by parties, we unanimously decided to dismiss the appeal for the reasons set out hereunder.

KEY BACKGROUND FACTS

The parties

[3] The appellant, being the plaintiff who initiated the suit is Evergreen Corporate Sdn Bhd, a company involved in recycling used tires into diesel, carbon black, steel wires and synthetic gas using green technology. The respondent, as the defendant in the court below is Export-Import Bank of

Malaysia Bhd ('EXIM Bank'), a government-owned development financial institution ('DFI'), which principal business seeks to promote reverse investment and export of strategic sectors such as capital goods, infrastructure projects, shipping, value added manufactured products and to facilitate the entry of Malaysian companies to new markets.

The facility agreement

[4] In 2016, in order to help fund the appellant undertaking a project awarded to it to construct and operate a thermal decomposition plant with green technology capable of recycling used tires in Simpang Pulai Perak ('the project'), the appellant turned to the respondent financial institution. This started on 2 November 2016 (but further revised on 14 February 2017 and 3 March 2017) where the respondent offered an Islamic financing facility of USD 10,350,000 ('the facility') to the appellant for the project.

[5] The offer was subsequently documented in an *Ijarah* facility agreement ('facility agreement') executed on 5 June 2017 where the respondent agreed to grant the facility to the appellant. The facility was for the purposes of the project — to enable the appellant to part finance the construction of the thermal decomposition plant and to finance 85% of the total purchase cost of the new thermal recovery unit from China.

The conditions precedent

[6] The facility agreement contains detailed terms and conditions applicable to the grant and drawdown of the facility. In particular, and especially relevant to this appeal, in accordance with cl 6.2 read together with Schedule 2 to the facility agreement, the appellant was contractually obliged to fulfil all the stipulated conditions precedent within one month from the date of the facility agreement — which was by 5 July 2017. It is noteworthy that there were 30 conditions precedent in total, consisting of 25 conditions precedent and five other additional conditions precedent (as defined and referred to in the facility agreement) that the appellant must comply with.

The termination

[7] On 27 August 2018 however, the respondent issued a termination notice on even date cancelling and terminating the facility and the facility agreement. This was done on the basis that the appellant had failed to fulfil the conditions precedent within the stipulated one month period. The appellant's request or appeal of 28 September 2018 for the facility to be reinstated was rejected by the respondent on 27 November 2019 (after the respondent had asked for supporting documents on 8 January 2019, and the appellant's response thereto on 21 February 2019).

[8] Thereafter, following the respondent's rejection on 20 January 2020 of the appellant's subsequent letter of demand dated 6 January 2020 demanding release of the financing sum, the appellant commenced the instant suit against the respondent on 2 July 2020.

[9] Primarily, the appellant sought a declaration that the termination was wrongful and prayed for specific performance of the facility agreement, as well as for damages, interests and costs.

THE VERDICT OF THE HIGH COURT

[10] The High Court, in dismissing the claim by the appellant held that the respondent's termination of the facility agreement is valid. The High Court concluded that at the time of the termination, and even thereafter, the appellant had not fulfilled all of the conditions precedent and the additional conditions precedent stipulated in the facility agreement to warrant the disbursement of the facility. It was also ruled that under the terms of the facility agreement, the respondent had the absolute discretion to terminate the facility at any time while there were still conditions which remained unfulfilled by the stipulated deadline, to the respondent's satisfaction.

[11] It was also found that there was no waiver of the requirement for the appellant to satisfy the conditions precedent which were still outstanding and that in any event the respondent was not obligated to provide notice to the appellant to fulfill the outstanding conditions precedent.

THE MAIN GROUNDS OF APPEAL

[12] Before us, the appellant raised a number of grounds to support its appeal. Principally, the appellant argued that time was at large after the lapse of one month from the date of the facility agreement and that the respondent had acquiesced in the conduct of the appellant who was working towards fulfilling the outstanding conditions precedent after the one month period. The respondent had however only issued the termination notice on 27 August 2018 which was more than one year after the expiry of the one month period.

[13] The respondent should thus, according to the appellant, have been estopped from relying on cl 6 and Schedule 2 to the facility agreement to insist on the fulfilment of all of the conditions precedent within the stipulated period of one month.

[14] The respondent ought to have also, after the lapse, given notice to the appellant and fixed a fresh date for full compliance of all conditions precedent. The appellant also maintained that the respondent was required to exercise its

right and discretion reasonably and fairly which it argued was not the case here. A

PRINCIPLES ON APPELLATE INTERVENTION

[15] It needs little reminding that the law is well-established in that an appellate court will not interfere unless the trial court is shown to be plainly wrong. The Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441, in the judgment written by Azahar Mohamed FCJ (later CJM) reaffirmed the principle to be followed by an appellate court when reversing findings of fact by a trial court: B C

> [60] It is now established that the principle on which an appellate court could interfere with findings of fact by the trial court is 'the plainly wrong test' principle; see the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (at p 10) per Steve Shim CJ (Sabah and Sarawak). More recently, this principle of appellate intervention was affirmed by the Federal Court in *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785 where it was held at p 375 (MLJ); p 800 (CLJ): D
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> > It is well settled law that an appellate court will not generally speaking, intervene with the decision of a trial court unless the trial court is shown to be plainly wrong in arriving at its decision. A plainly wrong decision happens when the trial court is guilty of no or insufficient judicial appreciation of evidence (see *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41b; [1978] 1 LNS 32; *Watt v Thomas* [1947] AC 484; and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309). E F

[16] In a relatively more recent Federal Court pronouncement on the principles surrounding appellate intervention in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 which cited the decision of the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, it was reaffirmed that the position has always been that a decision which is arrived at due to a lack of judicial appreciation of evidence is plainly wrong. G H

[17] In this light, we will examine the issues raised by the appellant next.

ANALYSIS AND FINDINGS OF THIS COURT

The essence of the pleaded case of the appellant I

[18] Whilst we observe that the memorandum of appeal (and the supplementary memorandum of appeal) and the written submissions of the appellant did not include any assertion that the respondent had wrongfully

terminated the facility despite the appellant having fulfilled all of the conditions precedent under the facility agreement, it is an undeniable fact, as rightly submitted by the respondent, that the appellant's pleaded case (as could be readily seen in paras 12, 18 and 19 of its statement of claim) was that the cancellation of the facility and termination of the facility agreement by the respondent were wrongful because the appellant had fulfilled all of the conditions precedent.

[19] It is of course trite law that a plaintiff must be bound by its own pleadings (see for example, the Federal Court decision in the case of *Giga Engineering & Construction Sdn Bhd v Yip Chee Seng & Sons Sdn Bhd & Anor* [2015] 6 MLJ 449; [2015] 9 CLJ 537).

[20] The High Court disagreed with the appellant and on clear evidence made the finding that at the time of the termination of the facility agreement, and equally significantly — even subsequently, the appellant had not yet fulfilled all of the conditions precedent stipulated in the facility agreement. It appears in any event that the appellant accepted this finding and did not raise this as a ground of appeal.

The respondent's right to terminate

[21] The appellant nevertheless argued that the respondent ought to be estopped from relying on cl 6 and Schedule 2 to the facility agreement, after having led the appellant to believe that the respondent would not insist on the strict compliance of these provisions. Crucially, Schedule 2 to the facility agreement, in para A reads as follows:

> Disbursement/Utilization shall be made after but not limited to the following Conditions Precedent and the Additional Conditions Precedent having been met. The Conditions Precedent and the Additional Conditions Precedent must be completed within One (1) month from the execution of the Facility Agreement failing which EXIM Bank shall have the absolute right to terminate the Facility Agreement.

[22] Furthermore, cl 6.2 of the facility agreement states as follows:

> In addition to the aforesaid, EXIM Bank's obligation to make available the Facility within the Availability Period shall be subject to the fulfilment prior to the Utilisation, of the conditions precedent and the additional conditions precedent as stipulated in Schedule 2 hereof (hereinafter referred to as 'the Conditions Precedent'). Additionally, EXIM Bank's obligation to continue to make available the Facility shall also be subject to the Special Conditions also as stipulated in Schedule 2 hereof.

[23] This cl 6.2 makes it clear beyond peradventure that the respondent's obligation to make the facility available within the availability period to the appellant borrower is subject to the latter having first fulfilled, among others, all conditions precedent stipulated in Schedule 2 to the facility agreement. Critically, the above parts of Schedule 2 stipulate that all conditions precedent (all of conditions precedent and additional conditions precedent) must be fulfilled within one month from the date of the execution of the facility agreement.

[24] Next, clause 6.4 of the facility agreement permits the respondent to terminate the facility at its discretion whilst the conditions precedent have yet to be satisfied by the appellant and that the respondent's decision in this respect shall be final and conclusive. Clause 6.4 reads thus:

> Pending the fulfilment in manner satisfactory to EXIM Bank of the Conditions Precedent as stipulated, EXIM Bank may at its absolute discretion terminate the Facility or suspend the availability of any Utilisation or issuance pursuant to the Facility and the decision of EXIM Bank shall be final and conclusive and shall not be questioned on any account whatsoever.

[25] As mentioned earlier, it cannot now be doubted that although it had satisfied several, the appellant had not fulfilled all of the conditions precedent as specified in the facility agreement, certainly not within the one month from the date of the execution of the facility agreement as contractually agreed by the parties.

[26] This, in our view, is a correct finding of the High Court, based on clear evidence such as the appellant's own appeal letter of 28 September 2018, and the testimony of two of its directors, PW4 and PW5.

[27] This non-compliance, pure and simple, by the appellant with the provisions of cl 6 and Schedule 2 entitled the respondent to invoke its right to terminate the facility. At the same time, as a corollary, given that a number of conditions precedent remained outstanding, the respondent's obligation to make available or drawdown on the facility under the facility agreement to the appellant was never triggered. This conclusion, we observe, follows contractual provisions typically found in loan documentation, and we venture to add, for all intents and purposes, standard banking practice.

[28] As such, in the case of *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188; [2010] 1 CLJ 665 the Federal Court ruled that the appellant bank's refusal to release the full financing sum to enable the respondent developer to complete a housing project resulting in losses to the respondent did not breach the financing agreement because the respondent borrower failed to comply with the

stipulated condition precedent. The Federal Court stated the following:

> [44] From our perusal of the evidence, we hold the view that the dispute over this matter was due to the reluctance of the appellant to release what was requested by the respondent unless they were strictly payments necessary for the completion of the Taman Dangi project up to the stage of a certificate of fitness for the houses built thereon. For this, the appellant demanded quotations on specific items to be spent. On the contrary, the respondent preferred a general disclosure on how this sum was to be expended in order to revive the project. They requested for an initial lump sum of RM20,000. Instead, the appellant only permitted a sum of RM2,000. The appellant's reason for this limit was the failure of the respondent to comply with the first condition set out in their letter of offer for this facility dated 17 July 1989 which reads:
>
> > To furnish the Bank with a detail breakdown on cost for purchase of window louver, glass panes, labour cost and other touch up work that need to be done to ensure issuance of Certificate of Fitness from the relevant authorities (Please provide quotations).
>
> [45] It is not in dispute that the respondent did not comply with this. If this is the case then the appellant was not at fault for refusing to release the full amount. For this reason, we find no merit in this ground.

[29] Not only did the appellant fail to comply with all of the stated conditions precedent within the requisite one-month period from the date of the facility agreement, which justified the respondent terminating the facility, as discussed above. As can be seen earlier, cl 6.2 of the facility agreement also states that the respondent is only obligated to make the facility available to appellant within the 'availability period' if the appellant has first fulfilled all of the conditions precedent.

[30] The expression 'availability period' is defined under cl 1.1 as 'the period as specified under item 3(c) of Schedule 1 hereto', and this item is defined as follows:

> Within a period of Twelve (12) months from the date of this Facility Agreement or such other date which shall be deemed to include any extension thereof made by EXIM Bank at its sole and absolute discretion, provided that the first Disbursement/Utilization shall be made within Three (3) months from the date of this Facility Agreement. Failure to make such Disbursement/Utilization shall entitle EXIM Bank to revoke/withdraw from granting the Facility.

[31] We state that it is basic banking practice that the obligation of a lender to make any or each drawdown under the loan or credit facility must be subject to the satisfaction of conditions precedent formulated by the lender as being relevant to the borrower and the loan. These conditions precedent, as drafted into the agreement, are the *sine qua non* of the drawdown; and for some conditions precedent, for each subsequent drawdown. There is therefore no

obligation on the part of the lender such as the respondent to make any drawdown of the facility if the borrower like the appellant herein does not fulfil all of the conditions precedent as contractually agreed upon in the facility agreement.

[32] There are in the case before us effectively two time periods governing the contractual right of the respondent bank to terminate the facility vis a vis the issue of the appellant's fulfilment of the conditions precedent. The first was that the respondent could terminate if all the conditions precedent were not met within one month from the date of the facility agreement. This, the appellant failed to meet fully, which led to the respondent exercising its right to cancel and terminate the facility.

[33] The second was that the respondent was also entitled to terminate the facility if there was no disbursement or utilisation of the facility within the availability period which ended on 4 June 2018, which was 12 months from the date of the facility agreement. Again, since the appellant did not utilise the facility within that period due to its failure to fulfil all of the conditions precedent, this also, separately, in pursuance of cl 6.2, entitled the respondent to cancel the facility at any time after the availability period ended, which the respondent in fact in our view lawfully did on 27 August 2018.

[34] At the hearing, counsel for the appellant highlighted that since there was no drawdown of the facility within the availability period, cl 2.2 should have applied and the facility had therefore been automatically terminated instead. Clause 2.2 states as follows:

> 2.2 The Facility shall be available within the Availability Period as stipulated in Item 3(c) of Schedule 1 hereof. Any portion of the Facility not utilized upon the expiry of the Availability Period shall be automatically cancelled unless otherwise previously extended by EXIM Bank, and shall not be available for further Utilization by the Customer unless agreed to by EXIM Bank at its sole and absolute discretion and at the request of the Customer.

[35] We however observe that the letter of termination issued by the respondent dated 27 August 2018 did not mention cl 2.2 but the above-stated Schedule 2 to the facility agreement, specifically on the failure of the appellant to comply with the requirement to fulfil all conditions precedent within the one-month period as the basis for its termination of the facility given the non-compliance. We provide again the same, as follows:

> Disbursement/Utilization shall be made after but not limited to the following Conditions Precedent and the Additional Conditions Precedent having been met. The Conditions Precedent and the Additional Conditions Precedent must be

A completed within One (1) month from the execution of the Facility Agreement failing which EXIM Bank shall have the absolute right to terminate the Facility Agreement.

B **[36]** For completeness, it should also be stated that there is no evidence that the respondent had ever granted the appellant any extension for the disbursement or utilisation of the facility, vis a vis the availability period of the facility which ended on 4 June 2018, being 12 months from the date of the facility agreement.

C *Whether the respondent is estopped from relying on cl 6 and Schedule 2 to the facility agreement to terminate after the lapse of the one month period*

D **[37]** However, the crux of the appellant's grievance in this appeal is that the respondent should be estopped from insisting on strict compliance with the said cl 6 and Schedule 2 because the appellant posited that the respondent had by its conduct represented to the appellant that notwithstanding the expiry of the one month period, the appellant could still pursue towards complying with the remaining conditions precedent.

E

[38] The appellant submitted that the principle of estoppel by convention applied to the facts of the instant case. We agree with the submission that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both
F or made by one and acquiesced in by the other.

[39] Crucially, the effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption (see *Lokumal (K) & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The August Leonhardt* [1985] 2 Lloyd's Rep 28; *Norwegian American Cruises A/S (formerly Norwegian American Lines A/S) v Paul Mundy Ltd, The Vistafjord* [1988] 2 Lloyd's Rep 343; Treitel, *The Law of Contract* (9th Ed) (1995), pp 112–113). In other words, here, the appellant contended that
H the respondent had led the appellant to believe that the respondent would not insist on the strict compliance with cl 6 and Schedule 2 to the facility agreement.

[40] Does this principle apply here? We do not think so. Neither does the
I similar principle of estoppel by conduct — where the party estopped has led the other party to believe in a certain fact — applies.

[41] We do recognise, as correctly found by the High Court, that pursuant to the terms of the facility agreement, the appellant had proceeded to take steps

and expended funds towards ensuring the fulfilment of the conditions precedent, which were its pre-disbursement obligations.

[42] This included making payments of fees and deposits to the respondent, professional fees to the project lawyers and consultants, securing relevant approvals from authorities, preparing the required documents, furnishing information and documents to the respondent, evaluating suitable technology providers capable of meeting technical specifications, as well as negotiating the relevant construction contract. The appellant also claimed to have made a purchase of property which was charged to the respondent, in the sum of RM11m.

[43] Apart from such compliance with some of the conditions precedent which cost not an insubstantial sum of money, a number of the conditions precedent were in fact satisfied well after the expiry of the one month period following the execution of the facility agreement, which we repeat was on 5 July 2017. The charge over the property was registered in favour of the respondent much later on 27 March 2018. Another major condition fulfilled was the approval from the Department of Environment, which was obtained even later on 11 June 2018.

[44] We therefore appreciate the contention of the appellant that by the respondent's conduct of accepting partial or late compliance with conditions precedent, such as registering the land charge in March 2018 and accepting subsequent payments and documents from appellant after July 2017, the respondent should be estopped from insisting on enforcing its rights as it had arguably waived the original one month timeframe such that time was no longer of the essence of the contract. Hence, the termination without giving a new timeframe was premature and unlawful.

[45] We do not find this contention convincing. It is misconceived. We say so in light of the terms of the facility agreement.

[46] We should in that respect briefly emphasise at this juncture, that one of the key governing principles of interpretation of contracts is that evidence given by witnesses or submissions by counsel on the interpretation of contracts such as the instant facility agreement (and charge annexure) is by and large irrelevant if not entirely inconsequential.

[47] This is because it is for the court to interpret the same, it being a question of law, as made clear in authorities such as the decision of this court in *NVJ Menon v The Great Eastern Life Assurance Co Ltd* [2004] 3 MLJ 38; [2004] 3 CLJ 96. We state that the words employed concerning the respondent's right under cl 6.4 of the facility agreement to terminate the facility

agreement are clear, unequivocal and unmistakable.

[48] The language of cl 6.4 plainly states that the respondent 'may at its absolute discretion terminate the facility' as long as the conditions precedent are left unfulfilled. Provided there are conditions precedent still unfulfilled within the one month period, the respondent therefore has the absolute discretion to terminate the facility, as it had done so.

[49] Crucially too, the clause does not state that the termination right must be exercised immediately on expiry of the one month period, or that it ought to be invoked during any particular timeline after the expiry of that one month period. Clause 6.4 is therefore independent of any time period.

[50] It cannot be emphasised enough that the court will give effect to the plain and unambiguous meaning of the terms in a contract as expressed by the parties, in the sense of what a reasonable person would have understood the contract to mean, unless there is ambiguity in the meaning of that term (see the Federal Court decision in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464). This reinforces the rule that construction of contracts is to be based on the plain and ordinary meaning of the provisions of the contracts, having regard to the entirety of the contractual context, barring genuine ambiguities.

[51] In the Court of Appeal decision in *Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd* [2009] 2 MLJ 546; [2009] 2 AMR 50, Abdul Malik Ishak JCA made the following key observation:

> [15] Of course, it is trite that when interpreting a contract, the language of the contract must be taken into consideration. The intention of the parties is to be primarily gathered from the language employed in the contract itself. If, and only if the language is vague, the surrounding circumstances may be looked into in order to assist in interpreting the contract (*Bipin Behari Deb v Masrab Ali and Others* [1961] AIR Vol 48, 173 Assam).
>
> [16] I am fortunate that the contract here is in writing and so the parties are confined within the four corners of the document in which they have chosen to seal their agreement and neither of them can adduce evidence to say that his intention has been misstated or overlooked in the agreement or that some essential features of the contract has been omitted or ignored. To allow such evidence would involve the plain violation of s 92 of the Evidence Act 1950 (*Afshar MM Tacki v Dharamsey Tricamdas* [1947] AIR (34) 98 Bombay).

[52] We find no ambiguities here, vis a vis the terms of the facility agreement. They are also not capable of two possible interpretations. Neither did the

appellant attempt to argue to either of such effect. Clauses 6.2 and 6.4, as well as Schedule 2 are not equivocal. Nothing about them or any other terms of the facility agreement are less than plain.

[53] Governed by such clear and specific terms of the facility agreement, the respondent's conduct of accepting any partial or late compliance of conditions precedent cannot therefore, be taken to have somehow constituted a waiver from the necessity for the appellant to adhere to the one month timeframe. The respondent did not acquiesce or waive the requirement for the fulfilment of all of the conditions precedent.

[54] The respondent was therefore, in our view, acting lawfully in accordance with the terms of the facility agreement when it decided to terminate the facility.

[55] The failure by the appellant to fulfil all of the conditions precedent could not therefore be attributed to the respondent. Significantly too, the appellant did not at the earlier material time challenge the validity of the termination of the facility agreement. This in our view lends considerable credence to the respondent's complaint that the appellant's grievance in this regard was more of an afterthought.

[56] Moreover, the appeal of the appellant on this ground could not succeed also because of the existence of cl 25.1 of the facility agreement, which although not a point raised before us, is a clear contractual term found in the facility agreement which was part of the appeal record. This is also a standard clause usually appearing in loan documents. The provision reads as follows:

> 25. WAIVERS, MODIFICATIONS AND INDULGENCE/REVIEW OF THE FACILITY
>
> 25.1 No neglect, failure or delay by EXIM Bank in exercising any right, power or privilege hereunder or under this Agreement and/or the relevant Security Documents shall operate as a waiver thereof nor shall any single partial exercise of any right, power or privilege preclude any further exercise thereof or the exercise of any other right, power or privilege. The rights and remedies herein and in this Agreement and/or the relevant Security Documents provided are cumulative and not exclusive of any rights and remedies provided by law and in equity.

[57] A similar provision is found in cl 7.4 of the charge annexure which states thus:

> 7.4 WAIVER
>
> Time shall be of the essence of this Charge but no failure or delay on the part of EXIM Bank in exercising nor any omission to exercise any right, power, privilege or remedy accruing to EXIM Bank under this Charge or any of the other Security

A Documents shall impair any such right, power, privilege or remedy or be construed as a waiver thereof or any acquiescence in such default; nor shall any action by EXIM Bank in respect of any default or any acquiescence in any such default, affect or impair any right, power, privilege or remedy of EXIM Bank in respect of any other or subsequent default.

B

[58] As such, in light of the foregoing clauses, even if the respondent had neglected, failed or delayed in exercising its contractual right to terminate the facility (which was not the case), this cl 25.1, as contained in the facility agreement executed by the parties, made it abundantly clear that such C neglect, failure or delay ought not to operate as a waiver.

[59] We are mindful of the position of the appellant that as the respondent did not immediately terminate the facility, but instead arguably appeared to D have accepted the appellant complying with the other remaining conditions precedent despite the lapse of the one-month period, such conduct of the respondent had the effect of the respondent being estopped from insisting on reliance on the strict terms of the facility agreement. Or that what had subsequently transpired between the parties created an estoppel against the E respondent.

[60] Nonetheless we observed that the appellant had not been able to substantiate its allegation of any such conduct of assurance and representations made by the respondent. There was in evidence nothing in writing that could F adequately support the appellant's claim of the application of estoppel against respondent.

[61] At the risk of repetition, we add that in the instant case, despite the assertion that the respondent had somewhat acquiesced in not insisting on G adhering to the one-month period, it is demonstrably clear from the facts that:

(a) the facility agreement conferred on the respondent the clear and specific right to terminate the same, which is not limited or specified in time;

H (b) the appellant did, after the termination, in its letter of 28 September 2018 appeal against the termination — in which the appellant also apologised for the delay, which was rejected by the respondent;

(c) no extension was granted by the respondent to extend time either in respect of the one-month period or pertaining to the availability period; I and

(d) the delay on the part of the appellant to meet all of the conditions precedent could not be attributed to the respondent.

[62] These facts and circumstances would in our view militate against any finding that the appellant could have taken the position that the respondent had waived the strict compliance with cl 6 and Schedule 2 to the facility agreement. We also hold that the presence of the above-mentioned non-waiver clause would further put paid to the assertion of the appellant.

[63] In the circumstances of the instant case, the estoppel argument could not defeat the operation of the non-waiver clause. In the High Court decision in *Interstate M&E Sdn Bhd & Ors v Fore-Sight Trading Sdn Bhd & Ors* [2007] 6 MLJ 677, Abdul Malik Ishak J (as he then was) ruled that reliance can only validly be made on estoppel if among others, there was an express or implied representation that a party will not rely on the legal rights in question and the representation must be sufficiently clear in that it is reasonably understood, in addition to that the other party must have altered its position in reliance on the representation.

[64] Moreover, other than settled exceptions, subsequent conduct cannot be considered for the purpose of interpreting a written agreement (see the decision of the House of Lords case in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 and this court's decision in *Semenda Sdn Bhd & Anor v CD Anugerah Sdn Bhd & Anor* [2010] 4 MLJ 157).

[65] The significance of this rule cannot be over-emphasised. The Privy Council in the case of *Lam Kee Ying Sdn Bhd v Lam Shes Tong & Anor* [1974] 2 MLJ 83 had already long held that an agreement cannot be construed in the light of parties' subsequent conduct especially when the instrument to be construed was in any case unambiguous, which is the case with the facility Agreement in this appeal. This is imperative.

[66] This was also applied by the Court of Appeal in *Perbadanan Kemajuan Negeri Selangor v Selangor Country Club Sdn Bhd* [2017] 2 MLJ 819. Further, the UK Supreme Court in the case of *Rock Advertising Limited v MWB Business Exchanges Centres Limited* [2018] UKSC 24 ruled that a no oral modification (NOM) clause is legally effective, overturning the Court of Appeal's ruling that a NOM clause did not prevent a valid variation by oral agreement. Lord Sumption, who delivered the leading judgment had, inter alia, this to say:

> 16. ... In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. *I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have*

A *to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself*: see *Actionstrength Ltd v International Glass Engineering In GL EN SpA* [2003] 2 AC 541, paras 9 (Lord Bingham), 51 (Lord Walker). (Emphasis added.)

B

[67] As such, there is little merit in the assertion that the respondent never insisted on strict compliance with the timeline for compliance with all conditions precedent. For there to be a valid and effective waiver, there must also have been a clear and an unambiguous representation by the conduct of C the respondent to the appellant in relation to the time period for the fulfilment of all conditions precedent in the facility agreement. There is none here. And no other evidence has been shown to adequately and meaningfully provide the requisite substantiation. There was simply no representation, let alone unequivocally made, or any alleged extrinsic evidence or subsequent conduct D that could, in this case give rise to an estoppel against the respondent intending to rely on the relevant and ambiguity-free terms of the facility agreement.

[68] We therefore find it irrefutable that the non-satisfaction by the appellant of all of the conditions precedent in the facility agreement within the E stipulated period resulted in the lawful termination of the facility agreement by the respondent, a consequence which is not only envisaged but also clearly expressed in cl 6.4 of the facility agreement. On the facts of this case, we do not see how such termination could be said to constitute an unreasonable or unfair exercise of the respondent's contractual right or discretion under the facility F agreement.

[69] We therefore find no fault in the High Court's conclusion on this issue, as follows:

G [67] Taking this further, EXIM could have terminated the facility agreement when the conditions precedent were not met by Evergreen within one month from the execution of the facility agreement as provided in para A in Schedule 2 of the facility agreement, but this EXIM did not do. Instead, EXIM allowed Evergreen to attempt to satisfy the conditions precedent even after the expiry of the one month. But this did not mean that EXIM waived its right to unilateral termination as provided in cl H 6.4. There was no evidence that EXIM did so. It was only after the availability period of the facility expired that the facility agreement was terminated.

Whether time was at large and the respondent should have fixed time for completion

I **[70]** The appellant further complained that the respondent had failed to give notice to the appellant to fix another completion date after time was at large. We disagree with this submission. We agree with the High Court. Time was not at large after the lapse of the one-month period because as found earlier, the respondent had the contractual right to terminate to be exercised at its absolute

discretion, which need not be exercised immediately, and did not acquiesce in the conduct of the appellant who tried to fulfil all the conditions precedent after the stipulated one-month period under Schedule 2 to and cl 6.2 of the facility agreement. The respondent never waived the strict compliance by the appellant with the said relevant clauses.

[71] The appellant relied on the case of *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65, where the Court of Appeal held that since the defendant did not rescind the contract when the plaintiff failed to complete the construction project for the defendant by the contractually stipulated date, and even allowed the plaintiff to remedy his default by permitting him to continue to work on the project until it was wholly completed, time was no longer to be regarded as of the essence of the contract. When time is no longer of the essence of the contract and no time for performance is specified, s 47 of the Contracts Act 1950 allows the promise to be performed within a reasonable time. If there has been unnecessary delay by one party, the other may give him a notice fixing a reasonable time at the expiration of which he will treat the contract as at an end.

[72] However, that case was one which involved property development agreement where time for completion had passed. In the instant case the contract is a financing agreement and the issue is not about failure to complete by the stipulated time but more on non-fulfilment of conditions precedent which would be typically governed by differently drafted terms. In any event, as shown above, the facts of the instant case before us demonstrate that the respondent had never waived the essence of time and that the appellant was never put in any belief that the respondent would not act on the appellant's failing to adhere to the requirement on fulfilling all conditions precedent within the timeline stipulated in the facility agreement.

[73] For the same reasons as discussed earlier therefore, we emphasise that the respondent could not be said to have treated time as ceasing to be of the essence. Furthermore, on the contrary, evidence shows that the appellant only started to challenge the termination much later. As mentioned earlier, it had sent an appeal letter dated 28 September 2018 post termination which admitted and apologised for the delay in making any drawdown of the facility within the availability period. There was no misunderstanding on the part of the appellant that the respondent had extended time or no longer insisted on adherence to the timeline.

[74] It accordingly follows that there was no necessity for the respondent to have either issued any notice to fix a new timeline or reminded and followed up with the appellant on ensuring compliance with the conditions precedents still unfulfilled, post the one-month period. The High Court was correct when it

found this:

> [48] The court also accepts that there was no evidence adduced by Evergreen to prove that EXIM had waived the requirement for Evergreen to fulfil the remaining conditions precedent and additional conditions precedent still outstanding and therefore there was no necessity for EXIM to remind or follow up with Evergreen on compliance ...

[75] This was also the conclusion reached by this court in the case of *Bank Islam Malaysia Bhd v Aquasix Corp Sdn Bhd & Ors* [2014] 3 MLJ 812 where not unlike the instant appeal before us, the plaintiff company's suit against the bank for the contractual breach of failing to allow drawdown of an approved financing facility (resulting in what was claimed to be lost business opportunity and profits) did not succeed. The Court of Appeal there held, setting aside the decision of the High Court, that the plaintiff failed to fulfil the relevant condition precedent, which were not waived, such that the bank had validly terminated the facility and was not in breach of contract.

[76] The relevant passages from the judgment read as follow:

> [24] The issue of this condition precedent is expressly provided for under cl 6.2(c) of the agreement — 'that the borrower (first plaintiff) shall have furnished to the bank (the defendant) the relevant documents evidencing its title to and interest in the property'. *This is a pre-disbursement condition of the financing facilities that the first plaintiff need to fulfil and comply. The first plaintiff had accepted and signed the said agreement without any complaint or reservation. The first plaintiff was fully aware of the contents of the said agreement. Therefore there is no necessity for the defendant to further communicate or put in writing to the first plaintiff in order to insist its request for the fulfilment and compliance of the said condition by the first plaintiff. There is no provision in the said agreement or other related documents requiring the defendant to do so.* (Emphasis added.)

[77] We add for completeness that parties had agreed to the terms of the facility agreement. Even if the conditions precedent were many and various, with some being very substantive and substantial, the appellant had agreed to be bound by the terms of the facility agreement, particularly on the necessity of fulfilling all of these conditions within one month from the execution of the facility agreement.

[78] It goes without saying that the terms of the facility agreement are contractual terms which are plainly binding on the parties given that it is so well — established that upon execution of an agreement, parties are bound by the entire document, in the absence of fraud or misrepresentation, and even regardless of whether a party has read the document or not (see *Serangoon Garden Estate Ltd v Marian Chye* [1959] 1 MLJ 113).

[79] Also, it is of importance to accept that not only must the courts give effect to the plain and ordinary meaning of a clause, but that it is also trite that the courts should not rewrite the terms of the contract, substitute any clauses or improve a contract, which by definition, has already been agreed by the parties (see *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597).

CONCLUSION

[80] In view of the foregoing analysis and reasons, we find that the appellant had failed to establish its claim against the respondent on a balance of probabilities. The High Court was certainly not plainly wrong in its findings which we hereby affirm, as a result of which this appeal is dismissed, with cost to the respondent.

Appeal dismissed.

Reported by K Selvaraju